5-22-2013

Vawter v. United Parcel Service Cross Appellant's Brief Dckt. 40660

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL VAWTER, Claimant-Respondent, vs. UNITED PARCEL SERVICES, Employer, and LIBERTY INSURANCE CORP., Surety, Defendants/Appellants, STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants/Cross-Appellant.	DOCKET NO. 40660 **RESPONDENTS/CROSS-APPELLANT STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND'S BRIEF**

RESPONDENT/CROSS-APPELLANT STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND'S BRIEF

Appeal from the Idaho Industrial Commission.

Commission Chairman Thomas P. Baskin presiding.

Rick Kallas, Boise, Idaho for Respondent/Cross-Appellant.

Susan R. Veltman, Boise, Idaho for Appellant.

Paul J. Augustine, Boise, Idaho for Respondent/Cross-Appellant State of Idaho Industrial Special Indemnity Fund.

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STATEMENT OF THE CASE

A. Nature of the Case

This is a workers' compensation case involving a low back injury suffered by Claimant/Respondent Mr. Vawter (hereinafter "Respondent" or "Claimant") on December 18, 2009 arising out of in the course of his employment with Defendant/Appellant United Parcel Service (hereinafter "UPS"). UPS initially denied that Respondent's injuries arose out of and in the course of his employment with UPS. After a 2010 hearing in which the Idaho Industrial Commission (hereinafter "Commission") held that the Respondent suffered a compensable accident, UPS filed a complaint against the Idaho Special Indemnity Fund ("ISIF") alleging that ISIF was liable, in part, for Respondent's total and permanent disability. R., Vol. II., p. 190.

B. Course of Proceedings

In light of the complex nature of the proceedings in this case, most of which are irrelevant to the issues involving the ISIF, ISIF will only detail the course of proceedings which apply to the ISIF.

On March 15, 2010, Claimant filed a workers' compensation complaint against UPS alleging a low back injury arising out and in the course of his employment with UPS due to an accident on December 19, 2009. R., Vol. I., p. 15. UPS answered Claimant's complaint on January 29, 2010 and denied Claimant's injury was the result of an accident arising out of and in the course of his employment. R., Vol. I., p. 6. On July 20, 2010 a hearing was held before the Commission, Referee Michael Powers presiding, to determine the compensability of Claimant's

claim, namely, whether he suffered a personal injury due to an accident arising out of and in the course of his employment with UPS. R., Vol. I., p. 18. On April 20, 2011, Referee Powers authored Findings of Facts, Conclusions or Law and Recommendations in which he found that the Claimant suffered an accident causing an injury arising out of and in the course of his employment with UPS on December 18, 2009. R., Vol. I., p. 30. On May 17, 2011 the Commission drafted its own Findings of Facts, Conclusions of Law and Order in which it ordered that the Claimant suffered an accident arising in the course of his employment causing an injury on December 18, 2009. R., Vol., I., p. 52.

On August 18, 2011, UPS filed a Notice of Intent to File A Complaint Against the ISIF. R., Vol. I., p. 77. On October 19, 2011, UPS filed a Complaint against the ISIF alleging that ISIF was liable for Claimant's alleged total and permanent disability. R., Vol., I., p. 190. On November 29, 2011, Claimant filed a Request for Calendaring on the issues of his entitlement to permanent partial impairment benefits; the extent of his disability, including total and permanent disability; ISIF's liability and apportionment under Idaho Code §72-406. R., Vol. II., pp. 200-201. On May 17, 2012, a hearing was held before the full Commission to determine, *inter alia*, the extent to which Claimant was entitled to impairment, disability and mileage benefits; whether Claimant was totally disabled; whether apportionment under Idaho Code § 72-406 was appropriate and whether ISIF was liable for Claimant's total and permanent disability. R., Vol. II., pp. 258-259.

On September 28, 2012 the Commission entered Findings of Fact, Conclusions of Law

and Order (hereinafter "2012 Decision"). R., Vol. II., pp. 269-316. The Commission ordered that the Claimant was totally and permanently disabled under the odd-lot doctrine; that the Claimant's had a pre-existing physical impairment of 7% of the whole person for his 1990 low back injury; that the Claimant's 7% low back impairment met all the elements of ISIF liability, including that it was a subjective hindrance and "combined with" his 2009 low back injury to result in his total and permanent disability; but it also ordered that UPS was estopped from asserting any position on Claimant's pre-existing physical impairment inconsistent with the 0% impairment rating assessed by Dr. Knoebel in 1991 and, as a result, it found that ISIF was not liable for any portion of Claimant's total and permanent disability. R., Vol. II, pp. 314-315. Thereafter, on October 17, 2012, UPS filed a Motion for Reconsideration of the Commission's 2012 Decision challenging, *inter alia*, the Commission's finding that UPS was estopped from asserting that the Claimant suffered any impairment due to his 1990 injury. R., Vol. II., pp. 338-339. On December 5, 2012 the Commission issued Errata correcting certain typographical and factual errors in its 2012 Decision. R., Vol. III., pp. 390-394. At the same time the Commission also issued its Amended Findings of Fact, Conclusions of Law and Order incorporating the corrections made in the Errata. R., Vol. III., pp. 395-442 (hereinafter "Amended 2012 Decision"). The Amended 2012 Decision did not alter the Commission's findings specific to the ISIF.

On December 10, 2012, the Commission issued its Order On Reconsideration and reiterated its prior finding that UPS was estopped, based upon the doctrine of quasi estoppel,

from asserting that Claimant has suffered a 7% impairment due to his 1990 low back injury thus absolving ISIF of any liability in the case. R., Vol. III., pp. 443-461.

On January 18, 2013 UPS filed its Notice of Appeal to Supreme Court pursuant to I.A.R. 11(d) asserting points of legal error in the Commission's 2011 and 2012 Decisions. R., Vol, III., pp.507-512. On February 1, 2013 Claimant filed a Notice of Cross Appeal alleging several points of error in the Commission's 2011 and 2012 Decisions. On February 4, 2013 ISIF timely filed a Notice of Cross Appeal alleging three points of error in the Commission's Amended 2012 Decision. R., Vol. III., pp. 553- 554.

C. Statement of Facts

At the time of the 2012 hearing, the Claimant was fifty two (52) years old and a resident of Donnelly, Idaho since 1970. 2012 Hearing Tr., p. 26, Ll. 2-15. He graduated from McCall-Donnelly High School in 1977. Id., Ll. 16-19. During his twenty six year tenure with UPS, Claimant was a package driver. 2012 Hearing Tr., p. 32, Ll. 1-24. When the Claimant was first hired by UPS he worked a feeder route in McCall. 2012 Hearing Tr., p. 130, Ll. 5-8. As the feeder route driver, he operated a 26 foot furniture van from McCall to Boise and back to McCall with stops in Horseshoe Bend. 2012 Hearing Tr., p. 130, Ll. 5-13. While working on the feeder route in 1990, Claimant lifted heavy packages, up to three to four hundred total pounds in a shift. 2012 Hearing Tr., p., 131, L. 4 - p. 133, L. 10.

For the past several years Claimant worked on the Cascade route. 2012 Hearing Tr., p. 132, Ll. 11-13. According to Claimant the McCall feeder route was easier from a physical

standpoint than the Cascade route. Id. at Ll. 14-25. He testified that on the Cascade route he would load his truck by himself every morning which required him to move packages from a trailer at the airport into his truck. The heaviest of these packages weighed 232 pounds. 2012 Hearing Tr., p. 33, Ll. 7-11; p. 137, Ll. 17-20. According to the UPS job description for Claimant's package driver position, he was required to lift up to 70 pounds, which placed his job in the heavy physical demand level. ISIF Ex. 9. A job site evaluation performed by the Industrial Commission Rehabilitation Division indicated that the Claimant was required to lift items over 100 pounds and up to 150 pounds by himself on an occasional basis. Claimant Ex. 6, p. 6004. As a result, the Claimant's job with UPS was classified as very heavy. Id.

Since the Claimant worked on an isolated route, UPS representative Dax Wilkinson explained that if the Claimant was required to lift a package weighing over 70 pounds he was encouraged to get help or use his hand cart. ISIF Ex. K ("Wilkinson depo."), p. 18, Ll. 13-24. If neither was available, the Claimant was encouraged to ask for assistance from a customer. Id. at p. 19, Ll. 8-14. However, Mr. Wilkinson acknowledged that the Claimant would be required to lift up to 150 pounds by himself due to the nature of his isolated route. Id. at p. 22, L. 15 - p. 23, L. 14. As Claimant explained, conditions such as snow or gravel prevented him from using a hand cart to carry heavy packages weighing in excess of 70 pounds. 2010 Hearing Tr., p. 138, L. 21 - p. 139, L. 13. He could not request assistance from another driver when he was required to lift up to 150 pounds because of his isolated route. Id.

UPS micromanaged and monitored every aspect and function of the Claimant's job,

including his walking pace, how he collected packages from the cargo area, his seatbelt use, his use of proper lifting techniques and vehicle operation. Wilkinson depo., p. 10, Ll. 9-18. UPS measured the package driver's walking pace by requiring three steps per second, even while carrying 70 pound packages in the snow. Wilkinson depo., p. 15, Ll. 11-22; p. 21, Ll. 1-16.

1. Claimant's Pre-Existing Medical Conditions

On March 24, 1988 the Claimant injured his right thumb working on the McCall feeder route. 2010 Hearing Tr., p. 35, Ll. 14-18. While pulling packages on a conveyor belt, his right thumb was crushed so he was rushed to the emergency room at St. Alphonsus where surgery was performed. 2012 Hearing Tr., p. 36, Ll. 2-5. His surgeon, Dr. William Lenzi, rated the Claimant's impairment at 9%. 2012 Hearing Tr., p. 33, Ll. 1-13. Dr. Lenzi did not impose any permanent restrictions on the use of the Claimant's hands and released him to full duty work. 2012 Hearing Tr., p. 37, Ll. 17-20. When he returned to work following recovery from his right thumb injury, Claimant did not request any special job modifications nor did UPS place any modifications on the way in which he performed his job. 2012 Hearing Tr., p. 40, Ll. 1-8. Claimant testified that UPS did not allow him to modify his job in any way. Id.

In October 1990 the Claimant suffered low back pain and right sided sciatica. 2012 Hearing Tr., p. 40, Ll. 12-15; UPS Ex. 10, p. 30. According to the Claimant, he was eventually referred to Dr. Patrick Cindrich. 2012 Hearing Tr., p. 41, Ll. 7-17. An MRI of his low back showed a small focal left paracentral disc protrusion at L4-5. UPS Ex. 10, p. 34. Dr. Cindrich suggested that Claimant was a possible percutaneous discectomy candidate. Id. However, an

EMG of the Claimant's right leg was normal and Claimant was prescribed physical therapy. 2012 Hearing Tr., p. 42, Ll. 1-5. On December 10, 1990, Dr. Richard Knoebel, who was hired by UPS, evaluated the Claimant to determine if he was able to return to work. 2012 Hearing Tr., p. 43, Ll. 2-4. Dr. Knoebel released the Claimant to full duty without restrictions or impairment. 2012 Hearing Tr., p. 42, Ll. 1-20. UPS, through its Surety, issued a notice of "Change of Benefits or Status" in which it adopted Dr. Knoebel's opinion that the Clamant was able to return to work without restrictions or impairment. UPS Ex., p. 32. After the Claimant was released to full duty by Dr. Knoebel, UPS allowed him to return to full duty unrestricted work as a package driver. 2012 Hearing Tr., p. 43, Ll. 13-15.

Upon his return to work following his low back injury in 1990, for the next 18 ½ years UPS did not provide him with any special accommodations nor did UPS allow him to modify the way that he did his job. 2012 Hearing Tr., p. 45, L. 20 – p. 46, L. 8. This was consistent with UPS's policy that required an injured worker to obtain a release to return to full duty following an injury. Wilkinson depo., p. 29, Ll. 18-24.

The Claimant testified that for the next 18 ½ years despite his 1990 back injury, he did not modify the way he performed his package delivery job in any way. 2012 Hearing Tr., p. 144, Ll. 8-14. He recalled that in 1990 his symptoms included low back pain, tingling across his hips and sore legs. 2012 Hearing Tr., p. 143, Ll. 2-21. His medical records documented sciatica. UPS Ex. 10, p. 34. Between his 1990 and 2009 accident the Claimant did not have the recurrence of similar symptoms; rather he had low back soreness such as muscle aches. 2012

Hearing Tr., p. 143, L. 22 - p. 144, L. 1.

Although Claimant could not recall the circumstances, in 1999 he reinjured his low back and was off work for four weeks. 2012 Hearing Tr., p. 148, Ll. 11-16. An MRI scan of his lumbar spine dated September 27, 1999, showed mild canal stenosis at L4-5 due to diffuse disk bulge and very mild bilateral facet osteoarthritis. UPS Ex. 21, p. 236. Regardless, Claimant testified that prior to his industrial accident in 2009 he felt "invincible" and was ready to work for UPS until retirement. 2012 Hearing Tr., p. 141, Ll. 24-25; p. 144, L. 22, p. 145, L. 4. He testified that during the 18 1/2 year period between his low back injury in 1990 and 2009, if he lost his job at UPS he felt physically capable of finding another heavy physical job in Valley County. 2012 Hearing Tr., p. 145, Ll. 5-12. During a short period when he was terminated by UPS following his 1990 back injury, he bought a construction business and operated heavy equipment. 2012 Hearing Tr., p. 133, L. 18 - p. 134, L. 2. Additionally, for 21 years (from approximately 1983 to 2003) the Claimant was a volunteer EMT in Valley County. He quit in 2003, not because of his physical problems, but because of literacy problems. 2012 Hearing Tr., p. 166, L. 18 - p. 167, L. 11.

Claimant admitted that after lifting heavy boxes for twenty eight years, his back would be occasionally sore at the end of the day but he was able to successfully perform all the essential functions of his job despite this occasional soreness for over 18 ½ years between low back injuries. 2012 Hearing Tr., p. 141, Ll. 12-16; p. 161, L. 24 - p. 162, L. 5. Finally, he reiterated in response to questions for the Commissioners, that prior to December 2009 he had absolutely

no lifting restrictions imposed on him by any of his physicians. 2012 Hearing Tr., p. 176, L. 20 - p. 177, L. 2.

In 2000 the Claimant injured his left shoulder while working for UPS. 2012 Hearing Tr., p. 46, Ll. 9-12. Eventually Dr. Steven Rudd performed a left rotator cuff repair. 2012 Hearing Tr., p. 47, Ll. 14-19. Dr. Rudd rated the Claimant's impairment at 7%. 2012 Hearing Tr., p. 47, L. 25. Dr. Rudd did not place any permanent restrictions on the Claimant and he was able to return to full duty capacity as a package driver. 2012 Hearing Tr., p. 48, Ll. 1-8. Once again, the Claimant testified that he did not request nor did UPS allow him to make any special accommodations to the way he performed his job upon his return to full duty following his shoulder surgery. 2012 Hearing Tr., p. 48, Ll. 9-16.

In 2004, while picking up packages to load his truck, the Claimant injured his right shoulder which eventually required surgery performed by Dr. Robert Walker. 2012 Hearing Tr., p. 49, Ll. 1-25. Following surgery, Dr. Walker rated Claimant's impairment at 10%. 2012 Hearing Tr., p. 50, Ll. 1-2. Dr. Walker released Claimant to return to work without restrictions after the Claimant had already successfully returned to full duty work at UPS. 2012 Hearing Tr., p. 50, L. 6 - p. 51, L. 25; UPS Ex. 11, p. 112. As with his other injuries following his full release to return to work, Claimant did not ask for any special job modifications nor did he modify the way that he performed his job as a package driver as a result of his right shoulder injury. 2012 Hearing Tr., p. 52, Ll. 4-10. Following his shoulder surgeries and return to full duty, the Claimant testified that he had no problems reaching up to the truck ceiling to stock or remove

packages as part of his job duties. 2012 Hearing Tr., p. 160, Ll. 5-13.

2. Claimant's 2009 Injury and Medical Care

On Friday, December 18, 2009, Claimant arrived at the Cascade Airport (Arnold Aviation) at 6:20 a.m. and started his UPS truck. 2010 Hearing, Tr., p. 27, L. 21. He then went into the airport lobby to sit down while his truck warmed up. While doing so he bent over to tie his boots and felt a pop in his low back. 2010 Hearing Tr., p. 28, Ll. 18-25. Claimant sought medical care on December 28, 2009 from Scott Harris, M.D. 2010 Hearing Tr., p. 32, Ll. 17-20. Dr. Harris referred the Claimant to Dr. Frizzell. Dr. Frizzell treated the Claimant for a large herniated lumbar disc at L4-5 as well as the development of early cauda equina syndrome. Frizzell depo. p. 6, Ll. 13-16. Dr. Frizzell performed had two surgeries. The first included laminectomy and discectomies on January 20, 2010. Id. at Ll. 20-22. He performed a second surgery on July 21, 2010 -- a lumbar fusion and recurrent discectomy. Id. at p. 7, Ll. 10-15.

Dr. Frizzell opined that Claimant's December 2009 accident caused two free fragment disc herniations on the left side and a small protrusion on the right at L4-5. He related this pathology directly to Claimant's industrial accident on December 18, 2009. Claimant Ex. 1, p. 1040.

Dr. Frizzell initially opined on December 6, 2010 that due to his 2009 accident the Claimant suffered a 20% impairment of the whole person using the 5th Edition to the AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Claimant Ex. 1, p. 1089. After reviewing Claimant's past medical records, Dr. Frizzell opined that although Claimant had

previous lumbar issues in 1990, since he had been released to full duty without any permanent impairment or restrictions, there was "no apportionment of his 20% impairment of the whole person to a pre-existing condition." Id.; Frizzell depo., p. 12, Ll. 5-15. Dr. Frizzell also opined that the Claimant's restrictions, including a 20 pound lifting restriction, were "directly related to his work injury of December 18, 2009." Claimant Ex. 1, p. 1090.

On March 10, 2011 he reiterated his opinion that "any current disability or permanent restrictions would be solely related to the December 18, 2009, injury" on March 10, 2011. Claimant Ex. 1, p. 1102. He based his opinion on the fact that the Claimant had no permanent restrictions or disability prior to his December 18, 2009 work injury due to his low back condition. Id. At that time, Dr. Frizzell apportioned 7% of Claimant's impairment to a pre-existing disc herniation at L4-5 in 1990. Id. at p. 1101.

Dr. Frizzell was then asked to reconsider his apportionment of impairment by Claimant's counsel. In response, Dr. Frizzell explained that under the AMA Guides the apportionment analysis required (1) documentation of a prior factor; (2) that the current impairment is greater as a result of the prior factor; and (3) evidence that the prior factor contributed to the impairment based upon a reasonable probability, that is greater than 50% likelihood. Id. at p. 1109. Dr. Frizzell refused to reconsider his apportionment opinion, stating that "I am in agreement that Mr. Vawter was released after 1990 without any permanent restrictions and performed a very physically demanding job as a UPS package driver for nineteen-years until his December 18, 2009 industrial accident." Id.

By correspondence dated September 14, 2011, UPS's counsel asked Dr. Frizzell for his opinion whether Claimant should have been assigned permanent restrictions for his back condition prior to his 2009 accident and whether under Idaho Code § 72-406, he could apportion disability. Claimant Ex. 1, p. 1114. Dr. Frizzell responded on September 19, 2011 that Mr. Vawter's permanent disability should be apportioned between his December 18, 2009 work injury and his previous lumbar spine injury even though he did not have any restrictions in place prior to his 2009 work injury. Id. at p. 1116. He added that Claimant "should have" had a 75 pound maximum lifting restriction in place based upon his 1990 lumbar disc herniation. Id.

In his deposition, Dr. Frizzell's change of opinion regarding apportionment was challenged. When he was asked to explain how Claimant's current impairment rating was greater as a result of a prior factor as required by the AMA Guides, he testified "no, I can't confirm that." Frizzell depo., p. 22, L. 18 - p. 23, L. 4. He also admitted that there were no medical records that confirmed that prior to Claimant's 2009 industrial injury he had range of motion deficits, as required to apportion impairment. Frizzell depo., p. 24, Ll. 2-8.

Dr. Frizzell testified he imposed retroactive restrictions in 2011 because Claimant "should have had limitations after his first disc protrusion in 1990." Frizzell depo., p. 26, L. 22 - p. 27, L. 1. Dr. Frizzell acknowledged that disc protrusions aren't necessarily permanent as they can spontaneously heal over time. Frizzell depo., p. 34, Ll. 9-18. He added that a symptom of disc protrusion at L4-5 is sciatica and that there was no medical evidence between 2000 and 2009 that the Claimant suffered from sciatica. Frizzell depo., p. 35, Ll. 13-21. Finally, Dr.

Frizzell admitted that he could only speculate as to whether the Claimant's disc herniation was present between 2000 and 2009. Frizzell depo., p. 36, Ll. 4-13.

3. Expert Vocational Opinions

At the hearing Barbara Nelson (on behalf of Claimant) and Nancy Collins (on behalf of UPS) gave opinions regarding the extent of Claimant's disability and ISIF liability. Ms. Nelson opined that the Claimant's right thumb injury suffered in 1988 did not constitute an obstacle or hindrance to his employment. 2012 Hearing Tr. p. 25, Ll. 12-16. She also opined that the Claimant's right thumb injury did not combine with his December 2009 industrial injury to produce his current disability. Id. at Ll. 17-20.

She also considered Claimant's testimony that he did not limit himself as a result of his 1990 low back injury because he was able to return to full work duties without restriction, including "very heavy work." 2012 Hearing Tr., p. 226, Ll. 8-12. She then opined that Claimant's October 1990 low back injury did not constitute an obstacle or hindrance to his employment and that it did not combine with his subsequent December 2009 low back injury to cause total disability. Id. at Ll. 13-19. The basis of her opinion was that the Claimant was able to perform very heavy work for long hours every day for eighteen and a half years with the exception of four weeks and that he had no write ups from his employer, and no excessive absenteeism that would demonstrate "a vocational implication." 2012 Hearing Tr., p. 226, L. 21-p. 227, L. 1.

Similarly, Ms. Nelson testified that Claimant's left shoulder injury in September 2000 did

not constitute an obstacle or subjective hindrance to his employment because he was able to return to his job and perform all the functions of his heavy physical job. 2012 Hearing Tr., p. 227, Ll. 11-21. She added that Claimant's left shoulder did not combine in any way with his subsequent low back injury in 2009 to cause total disability. Id. at Ll. 17-21. With respect to Claimant's 2004 right shoulder injury, she testified that it did not constitute an obstacle or subjective hindrance to Claimant's employment nor did it combine with his low back injury in 2009 to cause his total disability. 2012 Hearing Tr., p. 228, Ll. 3-7.

Based upon the Claimant's medical history which demonstrated that he was released to return to full duty at a very heavy physically demanding job which he performed for 18 ½ years after his initial low back injury in 1990, Ms. Nelson opined that the Claimant had access to his entire labor market prior to his industrial accident of December 18, 2009. 2012 Hearing Tr., p. 245, Ll. 15-22. Although she did not find Dr. Frizzell's hypothetical, retroactive 75 pound lifting restriction imposed in 2011 for his 1990 low back injury persuasive, she acknowledged that if these restrictions had been in place, the Claimant would have suffered a limited loss of access to his labor market. However he still would have been able to retain his employment with UPS. 2012 Hearing Tr., p. 246, Ll. 5-20.

Dr. Nancy Collins testified on behalf of UPS. In her initial December 2011 report, she expressed no opinions regarding ISIF liability. UPS Ex. 18. However, at hearing Dr. Collins expressed several opinions regarding ISIF's potential liability. Dr. Collins testified that if Claimant was an odd-lot worker, his pre-existing disc herniation could have reasonably

obstructed his ability to obtain employment in the McCall labor market, assuming that the Commission accepted Dr. Frizzell's September 2011 opinion that Claimant should have had 75 pound lifting restrictions imposed on him in 1990. 2012 Hearing Tr., p. 259, Ll. 16-24; Claimant Ex. 1, p. 1116. However, she acknowledged that her opinion was based solely if the "75 pound restriction is considered that pre-existed for his back." Id.

She then explained her rationale for the opinion that the Claimant's prior low back impairment "combined with" his 2009 injury as follows:

> his 2009 injury was that he was bending over to tie his shoes and if he had had the 75 pound restriction in place before he might not have been doing the very heavy extended physical activities of all those years and perhaps that.—I'm you know, not a medical doctor, but perhaps this injury might not have happened, and again, that's my understanding of physicians restrictions is that it's to keep the worker from re-injuring or further injuring themselves.

2012 Hearing Tr., p. 262, L.18 - p. 263, L. 1. She did not identify any jobs in Claimant's current labor market that he would have had access to but for his pre-existing low back impairments.

Dr. Collins acknowledged that despite Claimant's pre-existing impairments he did "real well in his heavy physical job" with UPS for over twenty six years. 2012 Hearing Tr., p. 276, Ll. 20-23. She also acknowledged that during an eighteen year period Claimant only missed four weeks of work due to his low back injury. 2012 Hearing Tr., p. 278, Ll. 9-11. She testified that the Claimant's volunteer work as an EMT was also classified as heavy physical labor. 2012 Hearing Tr., p. 282, Ll. 21-24. She admitted that the Claimant had "no problem" performing volunteer work as an EMT for twenty three years. 2012 Hearing Tr., p. 282, L. 25 - p. 283, L. 4.

She also admitted that the fact Claimant worked without restriction in a heavy physical job successfully for 18 1/2 years was more persuasive evidence of his pre-existing disability than Dr. Frizzell's 75 pound retroactive lifting restriction. 2012 Hearing Tr., p. 281, L. 24 - p. 282, L. 6.

ARGUMENT

A. The Commission Correctly Applied the Doctrine of Quasi Estoppel to Estop UPS From Asserting That Claimant has a Ratable Pre-Existing Impairment Due to His 1990 Accident

In its brief, UPS argues that the Commission erred as a matter of law in applying the doctrine of quasi estoppel to bar UPS from asserting that the Claimant had pre-existing physical impairment from his 1990 injury based upon Dr. Knoebel's 0% impairment rating in 1991. UPS also claims that they did not have notice of this issue prior to hearing. The record demonstrates that the Commission properly applied the doctrine of quasi estoppel to prevent UPS from benefiting from its inconsistent positions regarding the Claimant's pre-existing impairment due to this 1990 low back injury. In 1991 UPS refused to assign or pay Claimant any impairment or disability benefits due to his 1990 low back injury based upon an opinion from its IME physician that Claimant had no ratable impairment attributable to this injury. Twenty years later, after a subsequent accident resulted in Claimant's total permanent disability, UPS sought to apportion some of its liability to the ISIF by obtaining an opinion from Dr. Frizzell in 2011 that Claimant's 1990 low back injury should have resulted in a 7% impairment, which was contrary to the position UPS took twenty years earlier.

UPS clearly knew that in order to prevail on its claim against ISIF it carried the burden of establishing that Claimant's 1990 impairment combined with his 2009 injury to result in total and permanent disability. Since this issue was noticed for hearing by the Industrial Commission, UPS was given proper notice that its inconsistent positions on the issue of Claimant's pre-existing impairment would be addressed at hearing. The Commission's finding that UPS is estopped from asserting a position inconsistent with its 1991 impairment rating is supported by substantial and competent evidence. Therefore, the Commission correctly found that ISIF, based upon the application of quasi estoppel, is not liable for any portion of Claimant's total permanent disability benefits.

In the case of *Watson v. Joslin Millwork, Inc.*, 149 Idaho 850, 854, 243 P.3d 666, 670 (2010), this court re-emphasized the standards of setting aside the order of the Industrial Commission:

> In fact, this Court may only set aside an order of the Industrial Commission on one of the following four grounds:
>
> > (1) The commission's findings of fact are not based on any substantial competent evidence;
> > (2) The commission has acted without jurisdiction or in excess of its powers;
> > (3) The findings of fact, order or award were procured by fraud; [or]
> > (4) The findings of fact do not as a matter of law support the order or award.
>
> *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 190, 207 P.3d 162, 166 (2009) (citing I.C. § 72-732).

UPS argues that the Commission erred as a matter of law by applying the doctrine of quasi estoppel against it and that its application was not supported by substantial and competent evidence.

When the Supreme Court reviews a decision from the Industrial Commission, it reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Ogden v. Thompson,* 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund (In re Wilson),* 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). The Supreme Court will not disturb the Commission's factual findings unless they are clearly erroneous. *Excell Constr., Inc. v. State, Dept. of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005) (citing *Hughen v. Highland Ests.*, 137 Idaho 349, 351, 48 P.3d 1238, 1240, (2002)). Nor will the Supreme Court re-weigh the evidence or consider whether it would have drawn a different conclusion from the evidence presented. Id. Finally, all facts and inferences must be viewed in the light most favorable to Respondent ISIF as it prevailed before the Industrial Commission. *Garcia v. J.R. Simplot,* 115 Idaho 966, 968, 772 P.2d 173, 175 (1989).

1. UPS has the Burden of Proving ISIF Liability, Including that the Claimant Suffered from a Pre-Existing Permanent Physical Impairment; thus UPS had Notice of the Quasi-Estoppel Issue

In order to impose liability on ISIF, the party seeking to establish ISIF liability must first prove that the Claimant was totally and permanently disabled. Idaho Code § 72-332. In this

particular case, ISIF admitted but UPS denied that the Claimant was totally and permanently disabled. Since UPS filed the complaint against ISIF, Idaho Code § 72-332 placed the initial burden on UPS to establish all of the following elements: (1) that Claimant had a pre-existing impairment; (2) that Claimant's impairment was manifest; (3) that Claimant's impairment was a subjective hindrance; and (4) that Claimant's pre-existing impairment and his subsequent low back injury combined to result in total permanent disability. *Garcia,* 115 Idaho at 968, 772 P. 2d at 175; *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 82, 921 P.2d 1200 (1996). In its answer to UPS's complaint, ISIF raised several affirmative defenses implicating the doctrine of quasi estoppel, including that the Claimant did not suffer any permanent physical impairment prior to his last industrial injury, that his pre-existing impairment did not constitute a subjective hindrance or obstacle to his employment and that his pre-existing impairments did not combine with his last injury to render him totally and permanently disabled. R., Vol. II., p.198.

As a result, UPS knew that the ISIF was contesting three elements of its liability. UPS bore the burden of establishing each of these elements. In the Notice of Hearing dated March 7, 2012 the Commission advised all parties that the following issue would be heard at hearing: "whether ISIF is liable under Idaho Code § 72-332 and if so, apportionment under the *Carey* formula." R., Vol. II., p. 259. Implicit in this issue was whether UPS could establish the three contested elements of ISIF liability. Since UPS denied that Claimant was entitled to impairment and disability benefits, Claimant carried the burden of establishing entitlement to these benefits, a fact which was recognized by the Commission in its Notice of Hearing. R., Vol. II., p. 258.

(identifying Claimant's entitlement to permanent partial impairment and permanent disability as issues for hearing).

The Idaho Supreme Court has held that administrative tribunals, such as the Industrial Commission, are unable to raise issues without first serving an effected party with "fair notice" and a "full opportunity" to meet such issues. *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005). (citing *White v. Idaho Forest Indus.*, 98 Idaho 784, 786, 572 P.2d 887, 889 (1977). Idaho Code § 72-713 codifies this rule "the Commission shall give at least ten (10) days written notice of the time and place of hearing and of the issues to be heard..." Idaho Code § 72-713. UPS correctly noted that the Supreme Court held that the Commission does not need to specifically state each individual issue in the Notice of Hearing when a listed issue turns on another question not listed in the notice, such as the threshold issue of compensability. *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 727 P.3d 569, 573 (2012). In *Gomez,* this court, relying on *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097 (2006) held that Idaho Code § 72-713 does not require specific notice for issues of causation because it is an essential element of Claimant's claim for benefits. Id. In *Gomez*, the Claimant argued that she had no notice that she had to present proof of medical causation in her prima facie case seeking additional medical benefits due to an industrial injury because it was not listed as an issue in the Notice of Hearing. *Gomez*, 152 Idaho at 600, 272 P.3d 572.

In the present case, Claimant bore the burden of establishing entitlement to impairment and disability benefits including total permanent disability from UPS and UPS bore the burden of

establishing apportionment under Idaho Code § 72-406 or § 72-332, including the three contested elements of ISIF liability. As the Commission correctly noted, as part of his prima facie case, Claimant was required to prove that his December 2009 accident/injury by itself was responsible for causing his disability. Order on Reconsideration, p. 4; R., Vol. III., p. 446. Throughout the case, Claimant (and ISIF) argued that Dr. Knoebel's 1991 opinion assigning no ratable impairment including a return to work without restriction established that his disability was due solely to his 2009 accident and injury. UPS, on the other hand, argued that Dr. Frizzell's 2011 opinion retroactively assigned 7% impairment to Claimant's 1990 low back injury was more persuasive and should result in the apportionment of Claimant's disability either under Idaho Code § 72-406 (if it is less than total) or Idaho Code § 72-332 (if his disability was total). Since the Notice of Hearing gave UPS notice of the compensability issues, including its own burdens under Idaho Code § 72-332, it was not prejudiced by the Commission's failure to list quasi estoppel as an issue.

While not specifically pled by either Claimant or ISIF, both Claimant and ISIF argued that UPS's position regarding the extent of Claimant's impairment in 2011 was inconsistent with its position in 1991 when it refused to pay Claimant any impairment or disability benefits for his 1990 low back injury. The parties' respective burdens of proof identified above illustrate the importance of Claimant's pre-existing impairment on the outcome of the case. Since UPS carried the burden of establishing apportionment and it presented evidence of Claimant's pre-existing impairment due to his 1990 injury through Dr. Frizzell's 2011 opinion, it is

disingenuous for UPS to now argue that it had no notice that Claimant and ISIF would argue that its inconsistent positions on this issue prevent it from changing its position. In fact, both Claimant and ISIF argued in connection with their respective positions/burdens that UPS took inconsistent positions on this critical issue.

In his post-hearing brief, Claimant argued that the doctrine of quasi estoppel should apply to prevent UPS from taking a position in 2011 which was inconsistent with its position in 1991. ISIF also argued that UPS took inconsistent positions on the impairment issue which required the Commission to accept Dr. Knoebel's 1991 opinion which would result in a defense of UPS's claims against ISIF. Specifically, ISIF stated:

> UPS has been forced to take many inconsistent positions after it lost the threshold issue of compensability in this case. It is clear that UPS has taken positions which best suit its needs at the time, both before and after Claimant's injury even if they are now inconsistent. For example, while the Claimant was employed prior to his last accident, UPS accepted Claimant's full release to return to normal duties which he performed dutifully up until the time of his December 2009 industrial accident. Now, following his accident, UPS takes an inconsistent position and argues that the Claimant's prior injuries subjectively hindered him despite the lack of any evidence to support that contention. It maintains this position even though it micro managed every job function and would have taken corrective action or discipline if Claimant presented a safety risk. In 1990 UPS was able to avoid paying Claimant any impairment benefits when they obtained an IME from a doctor of their own choosing, Dr. Knoebel, who released the Claimant to full duty without impairment or restrictions. Now, UPS argues that the Claimant's current impairment should be apportioned by 7% to his previous injury for which they paid no impairment benefits. It is clear that the facts consistently undermine the credibility of the opinions and assumptions of UPS's experts, Dr. Frizzell and Dr. Collins. The only credible

> facts demonstrate that Claimant's pre-existing impairments did not constitute a subjective hindrance to him nor did they combine with his most recent accident to render him totally and permanently disabled. ISIF's Post-Hearing Brief, p. 3.

As the foregoing illustrates, Claimant and ISIF addressed the issue of estoppel in their post-hearing briefs. Since the estoppel issue was implicit in the issues identified for hearing based upon the respective burdens and positions of the parties, UPS had notice that it carried the burden of establishing pre-existing impairment and that the other parties would argue that UPS's position on this issue was inconsistent.

2. The Commission's Application of Quasi Estoppel on UPS is Supported by Substantial and Competent Evidence

Based upon UPS's inconsistent positions in this case, the doctrine of quasi estoppel as applied by the Industrial Commission is particularly appropriate. "To constitute quasi estoppel, the person against whom the estoppel is sought must have gained some advantage for himself, produced some disadvantage to the person seeking the estoppel, or induced such party to change his position; in addition it must be unconscionable to allow the person against whom the estoppel is sought to maintain a position which is inconsistent with the one in which he accepted a benefit. *Dawson v. Mead,* 98 Idaho 1, 557 P.2d 585 (1976); *KTVB, Inc. v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971)." *Tommerup v. Albertson's Inc.,* 101 Idaho 1, 6, 607 P.2d 1055, 1060 (1980). An examination of the facts of record establishes that there is substantial and competent evidence to support the Commission's application of the doctrine of quasi estoppel against UPS in this case.

Quasi estoppel is a "broadly remedial doctrine, often applied ad hoc to specific fact patterns." *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002) (citing *Keesee v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906 (Ct. App. 1986). Quasi estoppel does not require a misrepresentation by one party or actual reliance by the other. *Keesee,* 111 Idaho at 362, 723, P.2d 906.

The first element of quasi estoppel is "the initial taking of a position by a party against whom the doctrine is to be applied." *Tommerup v. Albertson's, Inc.* 101 Idaho 1, 6, 607, P.2d 1055, 1060 (1980). The "position" taken by UPS in 1991 was that the Claimant suffered no impairment or disability as a result of his 1990 low back injury. This is confirmed by their official notice of "Change of Benefit or Status" filed with the Industrial Commission in which UPS adopted Dr. Knoebel's opinion that the Claimant was able to return to work without restriction or impairment: "Per Dr. Knoebel's report, you were released to return to work effective April 2, 1991. You were determined to be medically stationary without any impairment." UPS Ex. 10, p. 32. Dr. Knoebel's opinion that the Claimant had no impairment or restrictions resulting from his 1990 low back injury was extremely favorable to UPS. In fact, it resulted in an advantage to UPS because based upon Dr. Knoebel's opinions UPS refused to pay any impairment or disability benefits to Claimant in 1991. If the Claimant would have had some ratable impairment at that time and/or restrictions on his ability to return to work, he would have been entitled to the payment of impairment benefits and possibly some disability. UPS denied Claimant those benefits because it found Dr. Knoebel's opinion that he had no ratable

impairment was persuasive. Therefore, the substantial and competent evidence of record establishes that UPS took a "position" in 1991 which resulted in an advantage to itself (because it did not have to pay benefits to Claimant) as well as a disadvantage to the Claimant (because he was denied the payment of any impairment or disability benefits at that time).

The next element of quasi estoppel requires that the position taken by UPS in 1991 be inconsistent with its current position. *Tommerup*, 101 Idaho at 607, P.2d at 1060. Here there is substantial and competent evidence to support the Commission's finding in this regard. The Commission stated in its Order for Reconsideration that "it is clear that the current position advocated by Employer is inconsistent with the opinion it took in 1991 in connection with the 1990 accident." Order on Reconsideration, p. 8; R., Vol. III., p. 450. As previously noted, in 1991 UPS took the position that the Claimant did not have any impairment due to his documented L4-5 disc protrusion from his 1990 injury. However, on March 10, 2011 nearly twenty years after Dr. Knoebel's contemporaneous opinion, Dr. Frizzell opined that "due to the Claimant's left-sided disc herniation in 1990 at L4-5" that "he should have had 7% of his impairment apportioned to this pre-existing herniation." UPS Ex. 20, p. 227. Thus, it is clear that Dr. Frizzell's opinion regarding Claimant's pre-existing impairment is related solely to the documented 1990 left sided disc herniation at L4-5. Perhaps the reason he has limited his apportionment to the 1990 injury is the fact that he testified that he could only speculate as to whether this condition existed in the five year period prior to his industrial accident in 2009. Frizzell depo., p. 36, Ll. 4-13.

The substantial and competent evidence of record establishes that both Dr. Knoebel and Dr. Frizzell rated Claimant's impairment due to his 1990 injury. Dr. Knoebel rated this impairment at 0%, a position which UPS then adopted and denied Claimant the payment of any impairment or disability benefits. In 2011, following his 2009 industrial accident (and after the Commission found it to be compensable) UPS then relied on Dr. Frizzell's opinion that the Claimant has a 7% pre-existing impairment due to his 1990 disc herniation to apportion its liability. UPS then adopted this opinion and took the position that Claimant's disability should be apportioned either under Idaho Code § 72-406 or Idaho Code § 72-332. Clearly UPS's positions regarding the extent of Claimant's impairment resulting from his 1990 injury are inconsistent and taken solely for the purposes of trying avoid some of its liability for the Claimant's total disability in 2011.

UPS has taken inconsistent positions with regard to the extent of Claimant's physical impairment designed solely to reduce it liability to Claimant for the payment of benefits. UPS has demonstrated that it will take any position, even if it is contradicted by its earlier position, solely in an effort to avoid payment of its workers' compensation liability. The fact that UPS will take any position however inconsistent designed to reduce its liability is the type of unconscionable behavior that quasi estoppel is meant to prohibit. As a result, UPS should not now be able to benefit from its inconsistent positions. Since there is substantial and competent evidence to support the application of the doctrine of quasi estoppel against UPS, this Court should affirm the decision of the Commission.

B. The Commission Exceeded Its Authority in Finding that Claimant's Pre-Existing Low Back Condition Combined With his Injury of December 18, 2009 to Cause his Total and Permanent Disability and its Finding is Not Supported by Substantial and Competent Evidence.

If this Court upholds the Commission's application of quasi estoppel against UPS in this case, UPS is liable for payment of Claimant's total permanent disability benefits. However, if this Court holds that quasi estoppel does not apply to UPS or was misapplied by the Commission, ISIF may be liable for a portion of Claimant's benefits based upon the Commission's finding that UPS established all the elements of ISIF liability. Alternatively, ISIF contends that the Commission's finding that Claimant's 1990 low back impairment combined with his 2009 injury is not supported by substantial and competent evidence and the Commission exceeded its role as a finder of fact by formulating its own medical opinions to reach this conclusion.

In order to satisfy the "combined effects" requirement of Idaho Code § 72-332(1), UPS must show that but for Claimant's pre-existing low back impairment, he would not have been totally and permanently disabled. *Bybee,* 129 Idaho at 80, 921 P.2d at 1204; *Seltzer v. Industrial Special Indemnity Fund,* 124 Idaho 144, 857 P.2d 623, 625 (1993). The mere presence of pre-existing impairment, is insufficient to satisfy the combined with requirement. *Tarbet v. J.R. Simplot, Co.,* 151 Idaho 755, 759, 264 P.3d 394, 399 (2011). For example, in *Seltzer*, the Court, citing *Garcia*, stated that the "ISIF is not liable unless the disability would not have been total but for a preexisting condition." Id. In *Tarbet,* the Idaho Supreme Court recently made it clear

that UPS must prove that but for the pre-existing impairments, Claimant would not have been totally and permanently disabled. *Tarbet,* 151 Idaho at 759, 264 P.3d at 399. Id.

In *Seltzer*, the claimant appealed a Commission determination that the ISIF had no liability, and the Supreme Court affirmed the Commission finding that the claimant was totally disabled solely as a result of the industrial injury, and that any pre-existing impairment was irrelevant under the "but for" test. Id., 124 Idaho at 146, 857 P.2d at 625. *Seltzer* involved a press operator at a plywood plant who suffered a back injury resulting in several back surgeries and a 65% impairment. The Commission accepted a panel's finding that the last industrial back injury and resultant depression alone rendered the claimant totally and permanently disabled. Although the claimant had pre-existing learning disabilities and was functionally illiterate, the Commission found that these problems did not combine with his low back injury to cause total disability, but that the claimant was totally and permanently disabled solely from the industrial injury. The Supreme Court concluded that the ISIF was not liable for total disability benefits stating that it was irrelevant whether claimant suffered from a pre-existing impairment. Id.

Similarly in *Eckhart v. Industrial Special Indemnity Fund,* 133 Idaho 260, 986 P.2d 685 (1999), the Supreme Court upheld a determination of the Commission that a claimant who had pre-existing impairments was totally disabled solely as a result of the industrial injury. In *Eckhart* the claimant was a truck driver who injured his low back when he fell at work. He also suffered from pre-existing conditions such as monocular vision in his left eye and tendon damage in his right arm. As a result of his low back injury he suffered from fatigue, chronic pain,

depression and hypertension and was restricted to lifting no more than 10 lbs. Id., 133 Idaho at 261, 985 P.2d at 686. The Supreme Court agreed with the Commission's finding that the claimant failed to establish that but for his pre-existing impairments to his left eye and right arm he would not have been totally and permanently disabled by his latest accident. As a result, the Supreme Court upheld the Commission's determination that the claimant was not entitled to benefits from the ISIF. Id., 133 Idaho 264, 985 P.2d 689.

Based upon Supreme Court precedent in *Garcia*, *Seltzer, Tarbet* and *Eckhart*, it is clear that UPS had the burden of establishing that but for Claimant's pre-existing impairment to his low back he would not have been totally and permanently disabled. UPS failed to offer any medical or vocational evidence to meet this burden as the substantial, competent evidence of record establishes that Claimant's total and permanent disability resulted solely from the effects of his 2009 low back injury and other non-medical factors. UPS based its "combined with" argument not on any medical evidence, but on the "common sense" proposition that "when you bend over to tie your shoes it's – you don't generally need two back surgeries and pursue a claim for total permanent disability." 2012 Hearing Tr., p. 17, Ll 16-19. UPS's counsel continued, "I believe the evidence will show that the shoe tying incident on December 18, 2009, would not have resulted in any disability at all if Mr. Vawter had not already had a preexisting disk herniation at L4-5, the same level involved in the current injury." 2012 Hearing Tr., p. 17, L. 23 – p. 18, L. 2. UPS offered no medical evidence to support its argument so the Commission created its own medical opinion based upon this "common sense" approach and found that the

Claimant's 1990 low back impairment combined with his 2009 low back injury to result in total permanent disability. Amended 2012 Decision, pp. 31-32; R., Vol. III., pp. 425-426.

1. The Commission Exceeded its Role as Finder of Fact by Formulating its Own Unqualified Medical Opinions in Support of its "Combined With" Findings

A review of the Commission's 2012 Amended Decision demonstrates that it exceeded its authority as finder of fact and created its own unqualified medical opinions to support its finding that the Claimant's 2009 injury combined with his pre-existing physical impairment to his low back to cause total permanent disability. The Commission articulated the basis of its opinion on the "combined with" element of ISIF liability as follows:

> Finally, Claimant suffered a severe worsening of his condition while engaged in the trivial exercise of bending over to tie his shoes, tending to corroborate the radiological studies referenced above, which demonstrate that Clamant had significant and progressive problems at L4-5 in the years preceding the subject accident. Absent Claimant's significant pre-existing condition at L4-5, it seems likely that the activities of December 18, 2009 would not have resulted in damage to Claimant's lumbar spine. At any rate, the medical evidence establishes that Claimant's pre-existing condition was significantly worsened as a result of the subject accident, and that it is impossible to ignore Claimant's pre-existing low back condition at L4-5 in describing Claimant's current impairment and limitations. Claimant's pre-existing low back condition clearly set the stage for Claimant's accident of December 18, 2009, and in that sense combines with the accident of December 18, 2009 to cause Claimant's total and permanent disability.

Amended 2012 Decision, pp. 31-32; R. Vol. III., p. 425-426. (emphasis added) Again, the Commission adopted UPS's "common sense" argument that "absent Claimant's significant pre-existing condition at L4-5, it seems likely that the activities of December 18, 2009 would not

have resulted in damage to Claimant's lumbar spine" despite the fact that UPS offered no medical evidence to support this proposition.

In fact, the medical evidence established that Claimant's massive disc herniation was caused directly by his 2009 industrial accident, rather than a combination of pre-existing causes. Dr. Frizzell opined on February 6, 2010 that

> On a more probable than not basis, Mr.Vawter's bending over to tie his boots caused the two free fragment herniations on the left side and the smaller protrusion on the right at L4-5. A note should be made that an MRI scan performed December 4, 1990 showed a small focal left pericentral disc herniation at L4-5. That pathology found at surgery on January 19, 2010, showed a very large herniation, which would be directly related to the bending over at work on December 18, 2009.

Claimant Ex. 1, p. 1040. (emphasis added) Dr. Frizzell continued "Mr. Vawter's bending over to tie his boots work accident t on a more probable than not basis caused a massive herniation at L4-5. This resulted in the need for the low back surgery January 19, 2010 on a more probably than not basis." Id. Later, on December 6, 2010 Dr. Frizzell reiterated his opinion that, from a medical standpoint, Claimant's December 18, 2009 accident was the sole cause of his massive disc herniation necessitating two surgeries, stating "all the above restrictions are directly related to his work injury of December 18, 2009." Claimant Ex. 1, p. 1090. Dr. Frizzell reiterated his opinion that all of the Claimant's permanent restrictions would be related solely to his December 18, 2009 injury on March 10, 2011 in a letter to UPS's counsel. Claimant Ex. 1, p. 1102.

In his deposition Dr. Frizzell offered no opinion to corroborate the Commission's finding.

Rather, Dr. Frizzell testified that he could not articulate how Claimant's current impairment rating was greater as a result of his prior impairment. Frizzell depo., p. 22, L. 18 - p. 23, L. 4. Dr. Frizzell admitted that disc protrusions aren't necessarily permanent as they can spontaneously heal over time and that there were no records to indicate that Claimant suffered from sciatica—a symptom of his alleged L4-5 disc protrusion—between 2000 and 2009. Frizzell depo., p. 34, Ll. 9-18; p. 35, Ll. 13-21. Finally, Dr. Frizzell testified that he could only speculate as to whether Claimant's disc protrusion was present in the five years prior to his industrial accident. Frizzell depo., p. 36, Ll. 4-13. None of this medical evidence supports the Commission's own medical opinion. There is no medical opinion to support the Commission's "combined with" findings in this case.

Since there was no medical opinion establishing that Claimant's 1990 low back injury combined with his 2009 massive disc herniation to cause total permanent disability, the Commission was forced to create its own. In so doing, the Commission clearly exceeded its role of finder of fact. Recently this court held that the Commission exceeded its role as a finder of fact when a referee formed her own unqualified medical opinions. *Mazzone v. Texas Roadhouse, Inc.*, Docket No. 39337 (Idaho April 26, 2013) at p. 13. It is clear from this court's decision in *Mazzone* that the Commission, as finder of fact, exceeded its authority by formulating its own medical opinion that "absent Claimant's significant pre-existing condition at L4-5, it seems likely that the activities of December 18, 2009 would not have resulted in damage to Claimant's lumbar spine...Claimant's pre-exiting low back condition clearly set the stage for Claimant's

accident of December 18, 2009, and in that sense combines with the accident of December 18, 2009 to cause Claimant's total and permanent disability." Amended 2012 Decision, pp. 31-32; R., Vol. III., pp. 425-426.

In *Mazzone*, the Commission's referee interpreted a medical manual to form her own unqualified medical opinions regarding a claimant's medical diagnosis. *Mazzone*, at p. 11. The referee, based upon her own interpretation of a medical manual, ignored the diagnoses of claimant's treating physicians. The Supreme Court made it clear that her only role as a finder of fact is to examine the methodology/opinions of physicians to determine which is more credible, not create her own medical opinion. *Mazzone*, at p. 12.

This Court reaffirmed the role of the Commission's referee as a finder of fact and not a medical expert. *Mazzone* at p. 13. This Court admonished the Commission for injecting its own medical opinion into a workers' compensation proceeding. Id. As in the present case, the Commission "may not use its specialized knowledge as a substitute for evidence presented at hearing." *Mazzone*, at pp. 13-14 (quoting *Kyu Son Yi v. State Bd. Of Veterinary Med.*, 960 A.2d 864, 870 (Pa. Commw. Ct. 2008)). In the present case, the Commission acting as finder of fact created its own medical opinion—that Claimant's 1990 low back impairment contributed to his 2009 injury given the "trivial" nature of his accident which caused total permanent disability—despite the fact that no medical opinions were offered to support this conclusion. As a result, under *Mazzone*, the Commission exceeded its role as trier of fact and the Commission's "combined with" finding should be disregarded.

2. *There is no Substantial and Competent Evidence to Support the Commission's Finding that the Claimant's 1990 Low Back Impairment Combined With his 2009 Injury to Result in Total Permanent Disability*

As shown in the preceding section, the only medical evidence offered at hearing through Dr. Frizzell was that Claimant's December 2009 accident was solely responsible for his massive disc herniation, his permanent restrictions and subsequent disability resulting therefrom. UPS offered no evidence in support of its "common sense" argument that Claimant's "trivial" act of bending over to tie his shoes would have resulted in two surgeries if it were not for his pre-existing condition.

Again, in order to satisfy the "combined with" requirement of Idaho Code § 72-332(1), UPS must show but for Claimant's pre-existing low back impairment, he would not have been totally and permanently disabled. Since the only pre-existing physical impairment argued to have combined with Claimant's 2009 injury was to the same body part, i.e., the Claimant's low back (at L4-5), UPS must establish through medical evidence that but for the Claimant's pre-existing condition he would not have been totally disabled due to his most recent accident. It is insufficient to show that Claimant had a pre-existing physical impairment to the same body part because UPS must show that "but for" the Claimant's pre-existing condition his disability would not have been total and permanent. In this case it requires a medical opinion that the extent of the Claimant's injury and disability was greater than it would have been if the Claimant had no pre-existing condition. UPS offered no evidence to support its burden and Dr. Frizzell admitted he could offer no evidence to support UPS.

Rather, the evidence establishes that Dr. Frizzell repeatedly opined that the Claimant's current restrictions related solely to his 2009 low back injury which, by itself, caused his massive disc herniation at L4-5 with two free fragment disc herniations on the left and a smaller protrusion on the right. The Commission, however, created its own unqualified medical opinion and accepted UPS's "common sense" argument that absent the Claimant's pre-existing condition the Claimant's activities of December 18, 2009 would not have resulted in damage to his lumbar spine. Since there is no evidence to support this finding, the Commission's finding that the Claimant's 2009 low back injury combined with his pre-existing impairment to render him totally and permanently disabled must be reversed.

C. The Commission's Finding that Claimant's 1990 Low Back Injury and Impairment Constituted a Subjective Hindrance to Claimant Prior to His December 18, 2009 Industrial Accident is Not Supported by Substantial and Competent Evidence.

The Commission found that UPS met its burden of establishing that Claimant's pre-existing 1990 low back impairment constituted a subjective hindrance prior to his 2009 accident. Amended 2012 Decision, pp. 29-30; R., Vol. III., pp. 423-424. However, an examination of the facts of record and the Commission's own reasoning establishes that there is not substantial and competent evidence to support the Commission's finding.

In *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990), the Idaho Supreme Court clarified the standard to be applied to the subjective hindrance requirement, indicating that a "simplistic test" would be used, that being "...whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular Claimant."

Archer, 117 Idaho at 172. It cannot be assumed or supposed because the Claimant had a pre-existing physical condition that it necessarily constituted a hindrance to his employment. *Tarbet* 151 Idaho at, 759 264 P.3d at 399. The test for whether an impairment constituted a hindrance to employment is "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular Claimant." *Archer,* 117 Idaho at 172, 786 P.2d at 563. Under the *Archer* test the Commission is to consider, "evidence of the Claimant's attitude toward the pre-existing condition, the Claimant's medical condition before and after the injury for which compensation is sought, nonmedical factors concerning the Claimant, as well as expert opinions and other evidence concerning the effect of the pre-existing condition on the Claimant's employability...." Archer, 117 Idaho at 172, 786 P.2d at 563.

In its Amended 2012 Decision, the Commission determined that Claimant's 1988 thumb, 2000 left shoulder and 2004 right shoulder impairments were not obstacles to Claimant's employment or reemployment. The Commission found that there was no testimony from Claimant, his evaluating physicians, or the vocational rehabilitation specialists that these impairments constituted obstacles to the Claimant's employment. The Commission placed significance on the fact that no physician gave Claimant permanent limitations/restriction for these injuries calling it a "significant factor" in its decision. Amended 2012 Decision, p. 29; R., Vol. III., p. 423.

The evidence that the Commission relied upon to find that the Claimant's 1990 low back impairment constituted a subjective hindrance to the Claimant is neither substantial nor

competent. Under *Archer*, a claimant's attitude towards his impairments is a factor. In response to questioning from Commissioner Baskin, Claimant testified that he did not consider his 1990 low back problem as a hindrance to the performance of his essential job functions as a package driver:

> Q. And as you – as you went back to work and continued to work as a package driver in 1991, 1992, 1993, what did you think? Did you continue to think that you had been right, that you – it was appropriate for you to go back to that job?
> A. Sure. You bet.
> Q. Had no problems?
> A. No problems.

2012 Hearing Tr., p. 159, ll. 15-22. UPS's own representative admitted that none of Claimant's pre-existing impairments affected his ability to perform the essential functions of his job. Wilkinson depo., p. 38, L. 25-p. 39, L. 14. It is also undisputed that each time the Claimant was fully released to return to full duty without restriction, he never requested -- nor did UPS offer -- special accommodations or job modifications.

The factual bases of the Commission's finding are unsupported by substantial and competent evidence: (1) Dr. Frizzell's 2011 retroactive impairment rating; (2) Dr. Frizzell's opinion that Claimant should have had a 75 lb. lifting restriction imposed on him in 1991 due to his low back injury and (3) his employment and medical records which suggested that he had low back symptoms. Amended 2012 Decision, p. 29; R., Vol. III., p. 423. However, Dr. Frizzell admitted in his deposition that he had no evidence to support his 2011 opinion on the apportionment of this impairment. Frizzell depo., p. 22, L. 18 - p. 23, L. 4.

Dr. Collins admitted that the fact that Claimant was successfully working for 18 ½ years without restriction in a heavy duty physical job at UPS and as an EMT was more persuasive than Dr. Frizzell's 75 pound retroactive lifting restriction. 2012 Hearing Tr., p 281, L. 24 - p. 282, L. 6.

Dr. Collins' admission undermines the competency of the evidence the Commission relied upon in reaching its finding. Furthermore, the Commission should have placed the same significance on the fact that no physician who treated the Claimant for 18 ½ years following his 1990 low back injury imposed any restrictions or limitations on his work activities as it had in determining that under the same circumstances the Claimant's other impairments did not constitute subjective hindrances to his employment.

The case of *ASARCO v. Industrial Special Indemnity Fund*, 127 Idaho 928, 908 P.2d 1235 (1996) is instructive on the subjective hindrance issue as the facts closely mirror those here. In *ASARCO*, the Commission concluded that none of Claimant's pre-existing conditions constituted a serious hindrance or obstacle to his employment, relying on the fact that after Claimant's 1988 surgery, his physician released him without restriction to return to his regular employment as an underground miner and laborer and, after a period of adjustment, he was able to work satisfactorily with only negligible difficulty. Although the Claimant had some difficulty tilting his head back when it was necessary to work overhead and required assistance in lifting heavy items, the Commission also considered the fact that he assisted other miners when they were performing heavy work. Furthermore the Commission considered the testimony of

Claimant's supervisor that Claimant was always able to do his job prior to his second accident. The Supreme Court affirmed the Commission's decision denying ASARCO's claims against the ISIF. *ASARCO*, 127 Idaho at 932, 908 P.2d at 1239.

Since UPS's own experts agreed that the factual bases of the Commission's findings are either unpersuasive or unsupported by the actual facts of record, the Commission's findings are not supported by substantial and competent evidence. As a result, should this Court reverse on the issue of quasi estoppel, it should also find that UPS failed to establish the subjective hindrance element of ISIF liability.

D. The Commission's Finding that Claimant Has a Pre-Existing Physical Impairment of 7% due to His Low Back Injury is Not Supported by Substantial and Competent Evidence.

The Commission found that Dr. Frizzell's 2011 opinion that Claimant's 1990 low back injury entitled him to a 7% impairment rating established an element of ISIF liability. Amended 2012 Decision, pp. 27-28; R., Vol. III, pp. 421-422. However, as the record demonstrates, Dr. Frizzell was unable to articulate the factual basis required by the AMA Guides to support this apportioned impairment rating, he admitted that the facts did not support this rating, he changed his original opinion that Claimant's low back impairment should not have been apportioned to a pre-existing condition and his flawed opinion was not supported by medical evidence.

Dr. Frizzell changed his opinions regarding Claimant's pre-existing impairment. Dr. Frizzell initially opined on December 6, 2010, that claimant suffered a 20% impairment of the

whole person using the 5th Edition to the AMA Guides. Claimant Ex. 1, p. 1089. After reviewing Claimant's past medical records, Dr. Frizzell again opined that despite his previous lumbar issues in 1990 there was "no apportionment of his 20% impairment of the whole person to a pre-existing condition." Id.; Frizzell depo., p. 12, Ll. 5-15. On March 10, 2011, his opinion changed and he apportioned 7% of claimant's impairment to a pre-existing disc herniation. Claimant Ex., 1 at p. 1101. However, in his deposition he was unable to articulate the basis of his changed opinion. He could not explain how Claimant's current impairment was greater based upon his prior impairment as required by the apportionment section of the AMA Guides. Frizzell depo., p. 23, L. 4. Since the medical lynchpin of UPS's "combined with" argument is admittedly absent and discredited by Dr. Frizzell's admissions, there is no substantial and competent evidence to support the Commission's apportionment of impairment.

Dr. Frizzell was also given the opportunity to explain how, under the AMA Guides, the claimant's pre-existing 1990 low back injury justified an impairment rating. He admitted there were no medical records that could confirm that Claimant was suffering from range of motion deficits as required to rate Claimant's pre-existing impairment. Frizzell depo., p. 24, ll. 2-8. With Dr. Frizell's impairment rating discredited, the Commission once again took it upon themselves to interpret Claimant's medical records and formulated their own medical opinion that since the claimant suffered symptomatic low back complaints, his pre-existing impairment should have been rated at 7%. Once again, this runs afoul of *Mazzone* and is contrary to the medical evidence.

CONCLUSION

This Court should affirm the Commission's finding that the doctrine of quasi estoppel prevents UPS from arguing that Claimant has a pre-existing impairment due to his 1990 low back injury. If it does not, then the Court should hold that the Commission's findings on the issues of "combined with," subjective hindrance and pre-existing impairment are not supported by substantial and competent evidence and are based upon the Commission's impermissible and unqualified medical opinions.

Dated this 22nd day of May 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of May 2013, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

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